

DETENTION OF CIVILIANS ON MILITARY OPERATIONS: REASONS FOR AND CHALLENGES TO DEVELOPING A SPECIAL LAW OF DETENTION

BRUCE 'OSSIE' OSWALD CSC*

[The taking and handling of civilian detainees during contemporary military operations is increasingly subjected to political, media and judicial scrutiny. This article argues that the most effective and efficient means of ensuring greater certainty, consistency and clarity in the identification and application of appropriate and relevant norms for dealing with detainees is to formalise those norms in a 'special legal regime'. It is only through increased formalisation and systematisation of legal principles, rules and standards that the appropriate balance will be achieved in determining the rights and obligations of both the civilian population and military forces. The author concludes by suggesting a number of principles that should form the basis of some fundamental norms required for this 'special legal regime'.]

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I INTRODUCTION

It is accepted that on most military operations military forces may be required to detain civilians¹ posing a threat to the security and safety of the force or the

* BBus (RMIT), MA (Kent), LLB (ANU), LLM (Lond); Senior Lecturer and PhD Candidate, Melbourne Law School, The University of Melbourne. I am grateful to Professor Gerry Simpson, Dr Wendy Larcombe, Mr Daniel Bethlehem, Mr Frederik Naert, Ms Carrie McDougall, Mr Tristan Moseby and the anonymous reviewers for their comments on earlier versions of this article. I remain grateful for the support of Ms Liz Saltnes. This article is based on the text of an address given by the author at the Copenhagen Conference entitled 'The Handling of Detainees in International Military Operations' on 11–12 October 2007 in Copenhagen, Denmark: see Bruce 'Ossie' Oswald, 'Detention in Military Operations: Some Military, Political and Legal Aspects' (2007) 46 *Military Law and the Law of War Review* 341.

¹ This article focuses only on the detention of civilians during military operations and does not consider in any detail the capture of combatants during armed conflict. The term 'civilian' as used in this article refers to those individuals who are noncombatants and who are not classifi-

general population. However, the detention of civilians during military operations is increasingly subjected to political, media and judicial scrutiny.² Issues currently receiving attention include the law applicable to detention, the legal basis for taking detainees, the treatment of those detained, the transfer³ and handover⁴ of detainees, and the accountability of military personnel.⁵ As a result

able as prisoners of war or retained persons. Prisoners of war are those members of the armed forces to the conflict who have been captured, as well as certain noncombatants: Ministry of Defence, United Kingdom, *The Manual of the Law of Armed Conflict* (2004) 143; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, arts 43–4 (entered into force 7 December 1978) ('*Additional Protocol I*'). Medical personnel and chaplains, while being members of the armed forces, are not combatants and therefore 'do not become prisoners of war but may be retained by the detaining power with a view to providing medical care or religious ministrations to prisoners of war': Ministry of Defence, United Kingdom, *The Manual of the Law of Armed Conflict* (2004) 146. See also *Additional Protocol I* art 43(2); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135, arts 32–3 (entered into force 21 October 1950) ('*Geneva Convention III*').

² For various documents concerning this scrutiny relating to the United States, see, eg, University of Minnesota Human Rights Library, *General Investigations Index* (June 2008) <<http://www1.umn.edu/humanrts/OathBetrayed/general-investigations.html>>. For scrutiny by the UK Parliament, see Foreign Affairs Committee, *2nd Report: Visit to Guantánamo Bay*, House of Commons Paper No 44, Session 2006–07 (2007). In relation to the European Union, see, eg, European Commission for Democracy through Law, Venice Commission, *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 66th plen sess, Opinion 363/2005 (17 March 2006). In 2007 alone, judicial scrutiny concerning aspects of detention has occurred in a range of courts and tribunals: see, eg, *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153; *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 ('*Al-Jedda*'); *Amnesty International Canada v Canada (Minister of National Defence)* [2007] FC 1147; *Behrami v France* (2007) 45 EHRR 85.

³ The term 'transfer' is used in this article to refer to situations where a detainee is passed between coalition forces.

⁴ The term 'handover' is used in this article to refer to situations where a detainee is passed to local authorities in the host nation.

⁵ See, eg, Andru E Wall, 'Civilian Detentions in Iraq' in Michael N Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines — Essays in Honour of Yoram Dinstein* (2007) 413; Karen L Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005); Adam Roberts, 'Torture and Incompetence in the "War on Terror"' (2007) 49(1) *Survival* 199; Adam Roberts, 'Human Rights Obligations of External Military Forces' in International Society for Military Law and the Law of War (ed), *The Rule of Law in Peace Operations* (2006) 429; Bruce M Oswald, 'The INTERFET Detainee Management Unit in East Timor' (2000) 3 *Yearbook of International Humanitarian Law* 347; Bruce 'Ossie' Oswald, 'The Law on Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations' (2007) 8 *Melbourne Journal of International Law* 311; Ed Lowe and Joseph Crider, *Detainee Operations: An Evolving Paradigm* (October 2005) Military Police Professional Bulletin <<http://www.wood.army.mil/MPBULLETIN/pdfs/Oct%2005/Lowe-Crider.pdf>>; Frederik Naert, 'Detention in Peace Operations: The Legal Framework and Main Categories of Detainees' (Working Paper No 94, Institute for International Law, 2006); James G Stewart, 'Rethinking Guantánamo: Unlawful Confinement as Applied in International Criminal Law' (2006) 4 *Journal of International Criminal Justice* 12; Thomas E Ayers, "'Six-Floors" of Detainee Operations in the Post-9/11 World' (2005) 35 *Parameters* 33; Susan Lamb, 'The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia' (1999) 70 *British Year Book of International Law* 165; Jordan J Paust, 'Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees' (2005) 43 *Columbia Journal of Transnational Law* 811; David Weissbrodt and Amy Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123. See also the leaked but unpublished report of the International Committee of the Red Cross on the behaviour of coalition forces in Iraq towards detainees: *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other*

of this scrutiny, there is a growing demand for greater certainty, consistency and clarity in the norms applicable to dealing with detainees, so that military operations can be conducted effectively and efficiently while dealing with the rights and obligations of civilians affected by the operation, as well as meeting the obligations of the military force conducting the operation.

In November 2007, for example, John Bellinger III, Legal Adviser for the US State Department, argued that the *Geneva Conventions*⁶ — the law traditionally used by military forces to deal with detaining individuals during military operations — do not provide sufficient guidance to those countries dealing with detainees in the course of the ‘War against Terror’. He stated that:

The United States is firmly committed to the law that applies. We’re also committed to working with other countries around the world to develop new legal norms in cases where existing law does not give one the answers. But what we do think is problematic is to simply suggest that the *Geneva Conventions* provide all of the answers in fighting international terrorism, and that countries simply need to follow the *Geneva Conventions* and that is the end of the matter.⁷

This article does not argue that the relevant existing legal regimes should be abandoned. It does, however, seek to contribute to the search for greater certainty, consistency and clarity in the norms applicable to detention by arguing that they be formalised and systematised.

The article begins by examining some key military and political issues that arise when dealing with detainees. It then considers whether the legal regimes that currently regulate the taking and handling of detainees adequately manage the military and political imperatives and expectations that arise during contemporary military operations. The principles, rules and standards relating to detention are fragmented. There is no single legal regime that can be relied upon

Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation (2004).

⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (‘*Geneva Convention I*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (‘*Geneva Convention II*’); *Geneva Convention III*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Geneva Convention IV*’) (collectively, ‘*Geneva Conventions*’).

⁷ Caitlin Price, *Geneva Conventions Must Be Clarified on Terrorism: State Department Legal Adviser* (27 November 2007) Jurist <<http://jurist.law.pitt.edu/paperchase/2007/11/geneva-convention-must-be-clarified-on.php>>. See also Roberts, ‘Torture and Incompetence in the “War on Terror”’, above n 5; Roberts, ‘Human Rights Obligations of External Military Forces’, above n 5; Oswald, ‘The Law on Military Occupation’, above n 5; Ellen Margrethe Løj, *Letter Dated 7 June 2006 from the Permanent Representative of Denmark to the United Nations Addressed to the Secretary-General*, 3, UN Doc S/2006/367 (2006), in which the Permanent Representative of Denmark to the United Nations asks ‘[h]ow should the [Security] Council approach developing a policy on what the United Nations peacekeeping missions could do in cases of rule-of-law vacuums, including on the need for United Nations forces to take on detention powers?’. See also Ministry of Foreign Affairs of Denmark Legal Service, ‘Non-Paper on Legal Framework and Aspects of Detention’ (Paper distributed at the Copenhagen Conference on the Handling of Detainees in International Military Operations, Copenhagen, 11–12 October 2007).

to apply to all situations of detention on military operations. The question then is whether greater certainty, consistency and clarity of norms relating to detention should be achieved simply by developing a better understanding of applicable legal regimes, or whether there is a need to formalise and systematise the norms relevant to the detention of civilians by developing a special legal regime.

This article argues that there does exist a need to formalise and systematise the norms for dealing with detained civilians. It proposes that this may be achieved by establishing a self-contained legal framework that codifies the interests, rights and obligations of various communities and entities involved in the detention of civilians during military operations.

While many of the issues discussed here are relevant to all forms of detention in the course of military operations, this article focuses on the detention of civilians. Consequently, while developing my arguments I am aware that, at its most basic and pragmatic level, any analysis or recommendation relating to the legal framework for detention must satisfy the needs of at least two stakeholders: military forces and civilians. One must avoid imposing what Adam Roberts refers to as 'legal encirclement' — military forces 'cannot be expected at all times and in all circumstances (especially those of combat) to observe what might be an unrealistically broad, and occasionally conflicting, array of ... legal obligations.'⁸

From the military perspective, it is fundamentally important that the legal framework is capable of being applied in the heat of battle. The military have a challenging job, and unnecessary complications are to be avoided. Any regime requiring legal training to interpret its provisions in the field will not lend itself to effective application. The civilian perspective must also be considered. Minimum rights must be protected, and regimes must be sufficiently simple to allow civilians to know and defend those rights. Both the military and civilians are likely to be concerned with having to interpret provisions that are ill-conceived, uncertain or overcomplicated.

The political aspect of detention is also very important. There is no single political approach to the issue, but incumbent governments are likely to have grave concerns as to the political and diplomatic consequences of military mistreatment of detainees. As such, their political perspective is likely to emphasise the importance of treating detainees humanely, with dignity and respect, and in accordance with international and national obligations.⁹ These military, civilian and political perspectives underscore the increasing difficulty in justifying a case-by-case approach to dealing with detainees. In the context of taking and handling detainees, acts (and sometimes omissions) can have serious consequences on lives, military success and political agendas. These perspectives also emphasise the need to develop a legal framework for dealing with detainees that accords with accepted legal norms and which is certain, consistent and clear in its application. Such a framework is essential to ensuring that the responses of military personnel dealing with detainees are reasonable and necessary in the circumstances as assessed at the time.

⁸ Roberts, 'Human Rights Obligations of External Military Forces', above n 5, 446.

⁹ See, eg, below nn 20, 27 and accompanying text.

II THE MILITARY AND POLITICAL CONTEXTS OF DETENTION

In order to better understand the legal issues that must be considered in developing a special detention regime, it is first necessary to outline some of the key military and political issues that arise when dealing with detainees. This Part begins by discussing some of the more important practical issues that arise for the military when planning and training for dealing with detainees, and also briefly discusses the particular challenges concerning the taking and handling of detainees when military forces are engaged in coalition operations. In relation to the political context of detention, this Part briefly discusses some of the political concerns surrounding military forces taking and handling detainees and how the law is used to manage such political concerns.

A *The Military Context*

In situations where military forces have planned for the detention of civilians, or have conducted or managed such detention, they have had to deal with a number of practical issues. These have included:

- determining the levels of force that are permissible when detaining individuals;
- responsibilities associated with questioning detainees;
- procedures for seeking authorisation to detain certain categories of individuals;
- security arrangements for transferring or handing over detainees;
- procedures for handing detainees to other internal or external authorities;
- the accountability of military personnel when dealing with detainees; and
- the role of local and international agencies.¹⁰

These issues arise in relation to military, political and legal aspects of detention, and it is these three aspects upon which the remainder of this article focuses.

Dealing with detainees requires considerable planning and training of military personnel to ensure that detention is conducted and managed in accordance with relevant legal norms and policies. The issues that need to be considered as part of the military planning process include:

- selection and development of appropriate detention facilities;
- provision of food that is appropriate to detainee needs;
- sanitation and medical requirements;
- access of international organisations to monitor the treatment of detainees;
- provision of legal advice to detainees;
- provision of ongoing religious support to detainees;

¹⁰ See also Oswald, 'The INTERFET Detainee Management Unit in East Timor', above n 5; Bruce 'Ossie' Oswald, 'The Treatment of Detainees by Peacekeepers: Applying Principles and Standards at the Point of Detention' in Roberta Arnold (ed), *Law Enforcement within the Framework of Peace Support Operations* (2008) 197.

- family member access to the detainees;
- allocation of troops to the running of detention facilities; and
- compliance with the appropriate rules of engagement for apprehending and treating detainees.

The taking and handling of civilian detainees requires military personnel to be trained in matters such as permissible levels of force, the treatment of women and children, techniques for questioning and the administration of a detention facility. It also requires commanders to ensure that orders, rules of engagement and standard operating procedures are appropriate to the circumstances faced by their forces on the ground, that their subordinates comply with relevant reporting requirements, that the treatment of detainees is adequately monitored and that appropriate procedures and processes are maintained to ensure the safety of detainees.

A number of reports, both national and international, have identified the importance of these issues in relation to ensuring successful detainee operations. For example, in a series of reports describing the lessons learned by US military forces serving in areas of operation such as Somalia, Haiti, the Balkans and Kosovo, US Judge Advocates recorded the importance of, among other things, planning early for detention issues, anticipating the transfer of responsibility for detainees and detention facilities to the host nation, meeting requirements relating to keeping accurate records, providing legal assistance to detainees, developing standards for detention and protecting detainees' rights through review processes.¹¹ Australian and Canadian legal officers involved in military operations where their forces have had to deal with detainees have reported on similar issues.¹²

Failure to plan effectively for detention can have serious implications. In relation to detentions under Multinational Force authority in Iraq, the United Nations Secretary-General has reported that

mass arrests are carried out by Iraqi police and special forces, acting alone or in association with the Multinational Force, and often without attention to due

¹¹ See, eg, Center for Law and Military Operations, Judge Advocate General's School, *Law and Military Operations in Haiti, 1994–1995: Lessons Learned for Judge Advocates* (1995) 63–72; Center for Law and Military Operations, Judge Advocate General's School, *Law and Military Operations in the Balkans, 1995–1998: Lessons Learned for Judge Advocates* (1998) 109–26; Center for Law and Military Operations, Judge Advocate General's School, *Law and Military Operations in Kosovo, 1999–2001: Lessons Learned for Judge Advocates* (2001) 98–119.

¹² For the Australian experience, see, eg, Michael J Kelly, *Restoring and Maintaining Law and Order in Complex Peace Operations: The Search for a Legal Framework* (1999) 206–12, 230–5; Oswald, 'The INTERFET Detainee Management Unit in East Timor', above n 5; Military Law Centre, Australian Defence Force, *Law and Military Operations in East Timor Sept 1999–Feb 2000* (2000) 41–51; Military Law Centre, Australian Defence Force, *Law and Military Operations in East Timor (UNTAET) Feb 2000–May 2002* (2002) 28–31. For the Canadian experience, see, eg, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair* (1997) especially vol 2 ch 22 <<http://www.dnd.ca/somalia/somaliae.htm>>.

process. Reports of ill-treatment of detainees and inadequate judicial procedures continue.¹³

The need for effective advance planning for detentions is amplified by the nature of modern military operations. An increasingly important component of military operations is interoperability. The military and social culture of coalition forces, their political concerns, their legal obligations and their capacity to undertake particular operations can impact on the way in which military forces deal with detainees. For example, some military forces might not have detention facilities in the area of operations and therefore have no choice but to rely upon a coalition partner to provide appropriate facilities. In such situations, arrangements will need to be made concerning (amongst other things) transfer processes and access to, as well as monitoring of, detainees.¹⁴ A force might also be subject to legal and policy limitations regarding the parties to whom they can transfer detainees, or regarding specify detainees who cannot be transferred to another partner.¹⁵

B *The Political Context*

It is increasingly clear that detention is no longer just a military matter. In the last few years, detention has become a political issue which has been managed between nations, and across military and civilian spheres. Thus, the national governments of troop-contributing nations must now manage the political consequences of potential and actual litigation concerning the treatment of detainees,¹⁶ the political consequences of negotiating agreements for the transfer of detainees,¹⁷ and the political consequences of allegations that they were aware of a coalition partner's mistreatment of detainees.¹⁸ In August 2005, for example, the Australian Senate through its Australian Foreign Affairs, Defence and Trade References Committee examined, amongst other things,

[w]hether any Australian personnel (including employees, contractors and consultants) were present, or had duties which included being present during any

¹³ *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, [50], UN Doc S/2005/585 (2005).

¹⁴ Roberts, 'Human Rights Obligations of External Military Forces', above n 5; Amnesty International, *Afghanistan — Detainees Transferred to Torture: ISAF Complicity?* (2007).

¹⁵ *Ibid.*

¹⁶ See, eg, Amnesty International, above n 14. Professors Michael Byers and William A Schabas wrote to the Prosecutor of the International Criminal Court on 25 April 2007, drawing to his attention 'possible war crimes committed [by the Canadian Minister of National Defence and the Canadian Chief of Defence Staff] with respect to the transfer of detainees from Canadian custody in Afghanistan': Michael Byers and William A Schabas, *Canadian War Criminals?* (27 April 2007) The Tyee <<http://thetyee.ca/Views/2007/04/27/WarCrime/>>.

¹⁷ See, eg, Roberts's description of the various negotiations with the government of Afghanistan to deal with detainees taken during the ongoing conflict in that country: Roberts, 'Human Rights Obligations of External Military Forces', above n 5, 439–45.

¹⁸ See, eg, Mark Riley, Interview with Robert Hill, Minister for Defence of Australia (Television Interview, 21 June 2004) <<http://www.defence.gov.au/minister/2004/210604.doc>>, concerning the allegations that Australia was aware of a report from the ICRC in which the issue of abuses at Abu Ghraib was raised.

interrogations or interviews (however defined) of persons detained in relation to the war in Iraq.¹⁹

National political concerns influence the international dimensions of a military operation by affecting which nations serve in a particular area of operation, which operations may be conducted, to whom detainees may be transferred and the extent to which international institutions engage with detention issues. Host nation politics also need to be managed in, among other things, determining when detainees are released and contextualising the power structures within various law and order authorities. The military also has political expectations that need to be considered. At the tactical level, for example, political issues influence the levels of authorisation that are necessary before particular classes of detainees can be taken, specific reporting requirements required for any dealing with detainees, and limitations as to who may detain. These political pressures at the national and international levels have led to greater reliance on the application of law.

Today, the language of law is a key component in dealing with the political and military dimensions of conducting armed conflict across international, national and institutional boundaries. It has been argued, for example, that law is increasingly being used as a method of warfare to achieve military objectives.²⁰ Law is therefore seen as a 'strategic partner for the military when it structures logistics, command, and control, and smoothes the interface with all the institutions, public and private, that must be coordinated for military operations to succeed'.²¹ Law plays an important role in creating and shaping obligations and perceptions across national and international spheres. Thus, in the context of detention, the combination of law and warfare ('lawfare') is a key element in both military and political debates concerning such issues as the justification for taking detainees; the treatment of detainees; the requirements to release, handover or transfer detainees; and the accountability and transparency that must exist when dealing with detainees.

One application of lawfare is to deal with obligations. Obligations created by international legal frameworks — *jus cogens* norms such as the prohibitions on torture, slavery and the slave trade, the prohibition of racial discrimination and apartheid, and the prohibition of hostilities directed at the civilian population²² — create bold boundaries within which military forces are required to work. For instance, when planning for, managing and conducting contemporary military operations, states that are signatories to the *Rome Statute of the International*

¹⁹ Foreign Affairs, Defence and Trade References Committee, Commonwealth Parliament, *Duties of Australian Personnel in Iraq* (2005) v. The Canadian Parliament has also considered this point: Canada, *Parliamentary Debates*, House of Commons, 19 March 2007, 1105 (Gordon O'Connor, Minister of National Defence).

²⁰ See Charles J Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts [sic]' (Paper presented at the Humanitarian Challenges in Military Interventions Conference, Washington DC, 29 November 2001).

²¹ David Kennedy, *Of War and Law* (2006) 37.

²² See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, 188, UN Doc A/CN.4/L.682 (2006).

*Criminal Court ('Rome Statute')*²³ must establish firm boundaries within which their troops must operate. Commanders and politicians are increasingly aware of the reach of both international and domestic criminal law. In the context of dealing with detainees, the comments of the Canadian Minister of National Defence are also likely to be echoed by government officials around the world:

Our government is committed to the goal of ensuring that each ... detainee is treated in accordance with international law. The protection of human rights is a central value to all ... and our government's commitment is to ensure that these values are held no matter where forces serve.²⁴

Another application of lawfare is to 'manage risk'. For example, troop-contributing nations that anticipated the likelihood of detaining civilians in Afghanistan entered into various memorandums of understanding ('MOUs')²⁵ concerning detainees.²⁶ These MOUs were created to manage, through a legal framework, the political debates that troop-contributing countries face when justifying their actions (and sometimes inactions) to a range of stakeholders interested in the treatment of detainees. In the Afghanistan example, these stakeholders include the government of Afghanistan, coalition forces in Afghanistan, and other interested parties such as the International Committee of the Red Cross ('ICRC') and Amnesty International. The use of MOUs in Afghanistan reinforces the point that the treatment of detainees is of considerable concern to commanders, government advisers, politicians and humanitarian organisations. The operational and tactical framework of military operations in Afghanistan has been shaped by limitations on the parties to whom detainees may be handed, the assurances that are required if detainees are transferred or handed over to other coalition forces or national authorities, and the requirements for detailed reporting and the ongoing monitoring of detainees. Roberts argues that the MOU regime set in place for Afghanistan is an attempt by international coalition partners and the Afghan authorities to

prevent a repetition of the muddles and disasters surrounding detainee treatment that have occurred in Afghanistan, Guantanamo, Iraq and elsewhere. ... The states involved appear to have understood, at least up to a point, the moral and strategic importance of these issues.²⁷

The recognition of the political risks associated with mishandling a detainee is linked to the acceptance that detainee issues in some circumstances can be a key factor in reaching the 'strategic defeat threshold'²⁸ for a particular military

²³ Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

²⁴ Canada, *Parliamentary Debates*, House of Commons, 19 March 2007, 1105 (Gordon O'Connor, Minister of National Defence).

²⁵ An MOU is an instrument concluded by states which is not legally binding. Thus, any breach of an MOU is usually dealt with using political and diplomatic means rather than by the law: see Anthony Aust, *Modern Treaty Law and Practice* (2000) 26–45.

²⁶ For a more detailed discussion concerning the development of MOUs in the context of military operations in Afghanistan, see Roberts, 'Human Rights Obligations of External Military Forces', above n 5, 439–45. See also Amnesty International, above n 14, 11–13.

²⁷ Roberts, 'Human Rights Obligations of External Military Forces', above n 5, 444–5.

²⁸ This term is taken from Chief of Army's Senior Advisory Committee, *Complex Warfighting* (2004) 8. Some military forces recognise that asymmetric warfare has led to adversaries being

operation. The law is used to explain and justify, not only to the military chain of command but also to other entities concerned with dealing with detainees, why particular tactical and operational options have been adopted. MOUs, in other words, use the law in a political and diplomatic context to manage the risks associated with taking and handling detainees.

Another application of lawfare to military and political concerns is its use to create strategic perceptions of the legitimacy of one or more parties engaged in the conflict. Thus, by creating a particular category of detainees — ‘unlawful combatants’, for example — the debate turns not upon the rights of the individuals detained during an armed conflict, but on the legal basis for denying an individual some or all of the rights to which they would otherwise be entitled. One effect of using law in this way is that it then becomes the idiom by which narratives of the ‘legitimacy’ of one side over another are used to speak to relevant national and international entities. For example, an alleged or actual abuse by one troop-contributing nation can adversely impact on the national and international perception of that country’s ‘legitimacy’, which in turn can alter perceptions relating to the success of a particular operation or military campaign. As Paul Gallis, writing for the US Congressional Research Service, stated:

There was a contentious debate among the allies over the December 2005 final communiqué guiding NATO operations in Afghanistan. Most of the allies were critical of US abuse of prisoners at the Abu Ghraib prison in Iraq; they extended this criticism to the US detention policy at Guantanamo Bay, where some prisoners captured in Afghanistan have been sent since 2001.²⁹

In summary, notwithstanding the practical military issues concerning the taking and handling of detainees, the issue of the detention of civilians during military operations has increasingly taken on a political dimension. One consequence of this politicisation is that law is increasingly being used to manage and create obligations and expectations in relation to dealing with detainees. The next Part investigates how this use of law can better manage expectations by formalising obligations.

III THE LEGAL FRAMEWORK

When developing legal frameworks for dealing with detainees, a key consideration is the degree to which existing legal regimes deal sufficiently with issues such as the taking of detainees; their treatment; the conditions under which they must be released, transferred, handed over or kept in custody; the standards of accountability to which military forces should be held; and the options available to detainees and their families if their rights have been abused.

able to win strategic battles, not with superior military forces, but with the ability to shape, amongst other things, public perceptions. Thus, there is an acceptance that some conflicts ‘result in a defeat threshold mismatch’ where tactical superiority does not guarantee a strategic victory because the defeat threshold strategically is assessed using different factors, including public perceptions of the ‘value’ of the conflict.

²⁹ Paul Gallis, *NATO in Afghanistan: A Test of the Transatlantic Alliance* (2006) 11. See also Marcy Strauss, ‘The Lessons of Abu Ghraib’ (2005) 66 *Ohio State Law Journal* 1269, 1303–6.

Generally speaking, the principles, rules and standards relating to detention are fragmented. There is no single legal regime applicable to all situations of detention during military operations. This is the case in situations of internal armed conflict or situations short of armed conflict, which are the predominant forms of military conflict in the contemporary world.³⁰ Similarly, it is now accepted that during an international armed conflict or occupation international humanitarian law ('IHL')³¹ must be supplemented in some situations by relevant human rights treaties.³² Consequently, in situations where there are legal provisions that do not apply de jure, it is hardly surprising that policy and legal advisers instead 'stitch together' a legal framework for each mission from a number of international and municipal sources.³³

Before considering in any detail the sufficiency of existing legal frameworks in the context of dealing with detainees, it is necessary to discuss the process followed by international lawyers where no specific legal regime exists. In those instances, international lawyers will make, among other things,

an initial assessment of what might be the applicable rules and principles. The result will often be that a number of standards might seem prima facie relevant. A choice is needed, and a justification for having recourse to one instead of another. Moving from the prima facie view to a conclusion, legal reasoning will either have to seek to harmonize the apparently conflicting standards through interpretation or, if that seems implausible, to establish definite relationships of priority between them. ... They do not do this mechanically, however, but rather as 'guidelines', suggesting a pertinent relationship between the relevant rules in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole.³⁴

³⁰ Between 1946 and 2007 there have been 135 internal armed conflicts, 44 internationalised internal armed conflicts, 45 interstate armed conflicts and 22 extrasystemic armed conflicts: Uppsala Conflict Data Program, *Active Conflicts by Conflict Type and Region* (15 September 2008) <http://www.pcr.uu.se/research/UCDP/graphs/type_reg.gif>. The figures come from the UCDP/PRIO Armed Conflict Dataset: see Nils Petter Gleditsch et al, 'Armed Conflict 1946–2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615. For definitions of these terms and descriptions of the methodology used to develop these figures, see Uppsala Conflict Data Program and International Peace Research Institute (Oslo), *UCDP/PRIO Armed Conflict Dataset Codebook: Version 4-2007* (2007) <http://www.pcr.uu.se/publications/UCDP_pub/UCDP_PRIO_Codebook_v4-2007.pdf>.

³¹ IHL refers to that area of law which is concerned with the conduct of armed conflict. It consists of treaty and customary law. The key IHL treaties that relate to the treatment of civilian detainees include *Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, [1910] UKTS 9 (entered into force 26 January 1910); *Geneva Convention IV*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

³² See, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 172, 178; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Unreported, International Court of Justice, Shi P, Ranjeva V-P, Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka and Abraham, Judges ad hoc Verhoeven and Kateka, Registrar Couvreur, 19 December 2005) [216]–[221].

³³ This assertion is based on both my experience and discussions with legal officers who have developed legal frameworks for dealing with detainees during military operations.

³⁴ International Law Commission, *Fragmentation of International Law*, above n 22, 24–5.

In the context of detention during military operations, this is an appropriate description of how detention regimes have been created. Not only is there is no single legal framework that regulates detention, but those legal regimes that do deal with detention — such as IHL and international human rights law ('IHL')³⁵ — do not have provisions that meet all the requirements that arise during contemporary military operations. For example, when creating the detention regime for the deployment of the International Force for East Timor ('INTERFET'), INTERFET's *Detainee Ordinance*, signed by the Commander of INTERFET on 21 September 1999, created a normative framework for dealing with detainees by combining the law on military occupation, human rights law, Indonesian law and Australian domestic law.³⁶ In such situations, lawyers and policy advisers analyse the relevant principles and rules of international law, host nation law and the law of the troop-contributing nation. They then identify the relevance of those laws to the particular military operation being conducted and apply the relevant principles and rules to the circumstances of detention.³⁷ Thus, as there is no single legal regime covering dealings with civilian detainees during contemporary military operations, legal frameworks for those regimes are created ad hoc and by analogy.

In situations of international armed conflict or occupation, IHL will apply to dealings with detainees as the *lex specialis*.³⁸ In such situations, IHL permits the detention of a civilian by a military force if they are a security internee, a voluntary internee³⁹ or a criminal detainee.⁴⁰ Article 42 of the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949* ('*Geneva Convention IV*'), for example, permits internment of a protected person where the 'security of the Detaining Power makes it absolutely neces-

³⁵ IHL refers to that body of law which 'stipulates that obligations are owed directly to individuals ... and ... provides, increasingly, for individuals to have access to tribunals and fora for the effective guarantee of those obligations': Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 95. The main treaties relevant to detention include: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). There are also 'soft norms', which in relation to detention include: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/Res/43/173 (1988); *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/Res/45/111 (1990).

³⁶ For a reprint of the *Detainee Ordinance*, see Military Law Centre, *Law and Military Operations in East Timor Sept 1999–Feb 2000*, above n 12, annex U.

³⁷ For a more detailed description of the process involved in developing legal regimes for detention, see David Marshall and Shelley Inglis, 'The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo' (2003) 16 *Harvard Human Rights Journal* 95; Oswald, 'The INTERFET Detainee Management Unit in East Timor', above n 5.

³⁸ H Victor Condé defines the term '*lex specialis*' (Latin for 'a special law') in *A Handbook of International Human Rights Terminology* (2nd ed, 2004) 150 as:

A specific rule that overrules a general principle or rule of law. It also refers to a specific law within a more general field of law. ... It carves out a particular area of a more general subject for special normative treatment. It is usually used in the interpretation of treaty norms as a rule that states that a specific rule will always overrule a general rule covering the same subject.

³⁹ *Geneva Convention IV*, opened for signature 12 August 1949, 75 UNTS 287, art 42 (entered into force 21 October 1950).

⁴⁰ *Ibid* arts 68, 76.

sary.⁴¹ However, the inadequacy of IHL for dealing with detainees has been noted. Jelena Pejic has argued that:

Even though internment in international armed conflict is regulated by the Fourth *Geneva Convention* and Additional Protocol I, these treaties do not sufficiently elaborate on the procedural rights of internees, nor do they specify the details of the legal framework that a detaining authority must implement. In non-international armed conflicts there is even less clarity as to how administrative detention is to be organized.⁴²

In situations where, as a matter of legal obligation, IHRL applies to the treatment of detainees, military forces will need to apply that law. In relation to torture, for example, state parties to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Convention against Torture*') have an obligation to take 'measures to prevent acts of torture in any territory under its jurisdiction.'⁴³ The relevance of IHRL to military operations has also been recognised by a number of international and domestic courts and tribunals.⁴⁴ One must, however, be careful not to assume that IHRL applies de jure in all situations during military operations. The recent decision of the Grand Chamber of the European Court of Human Rights ('ECHR') in *Behrami v France* is one example of a regional human rights court having to consider the limitations placed upon obligations arising from a regional human rights treaty in circumstances where state parties to the regional agreement have an overriding obligation to comply with a Security Council Resolution.⁴⁵ The ECHR found that the *Convention for the Protection of Human Rights and Fundamental Freedoms*⁴⁶

cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so

⁴¹ Ibid arts 42, 78.

⁴² Jelena Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005) 87 *International Review of the Red Cross* 375, 377. See also Roberts, 'Human Rights Obligations of External Military Forces', above n 5; Oswald, 'The Law on Military Occupation', above n 5.

⁴³ Opened for signature 10 December 1984, 1465 UNTS 85, art 2(1) (entered into force 26 June 1987). There is a debate, however, as to what 'territory under jurisdiction' means: see, eg, Christopher Greenwood, *International Law Framework for the Treatment of Persons Detained in Afghanistan by Canadian Forces: Report* (2007) <<http://www.bccla.org/antiterrorissue/greenwoodreport.pdf>> 19. This report was among the affidavits for the respondents examined by the Federal Court of Canada in *Amnesty International Canada v Canada (Minister of National Defence)* [2007] FC 1147.

⁴⁴ See, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 172, 178; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Unreported, International Court of Justice, Shi P, Ranjeva V-P, Judges Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka and Abraham, Judges ad hoc Verhoeven and Kateka, Registrar Couvreur, 19 December 2005) [216]–[221]; *Behrami v France* (2007) 45 EHRR 85; *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153; *Hamdan v Rumsfeld*, 548 US 557 (2006); *Amnesty International Canada v Canada (Minister of National Defence)* [2007] FC 1147.

⁴⁵ (2007) 45 EHRR 85, 121–2 (the Court).

⁴⁶ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

would be to interfere with the fulfilment of the UN's key mission in this field including ... the effective conduct of its operations.⁴⁷

Thus, the convention was excluded from application during a military operation because of an issue of jurisdiction. Another example of the limited reach of IHRL during military operations is provided by the case of *R (Al-Jedda) v Secretary of State for Defence* ('*Al-Jedda*'), in which the House of Lords noted that

there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those ... within its jurisdiction.⁴⁸

Lord Bingham sought to reconcile the clash by arguing that

the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 [of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)] are not infringed to any greater extent than is inherent in such detention.⁴⁹

The clash described above was resolved differently by Lord Rodger who argued that, in circumstances where the Security Council establishes the mandate for a military operation, the English courts have no capacity to scrutinise acts and omissions of forces acting pursuant to that mandate.⁵⁰ On this basis, he held that:

Mr Al-Jedda must find his protection from arbitrary detention in the commitment, given by Mr Powell to the Security Council, that members of the [multi-national force] would at all times act consistently with their obligations under the law of armed conflict, including the *Geneva Conventions*. It is for the Security Council, exerting its ultimate authority and exercising its ultimate right of control, to ensure that this commitment is fulfilled.⁵¹

It is important to be rigorous when identifying which IHRL provisions apply de jure. The nature of the human rights regime being relied upon, the issue of jurisdiction and subject matter relevance all remain important tools in assessing the binding nature of the application of a particular human rights norm to dealings with detainees. John Tobin argues for a substantive rather than a reductionist approach to applying human rights law.⁵² He states that under a substantive approach it is necessary to

⁴⁷ *Behrami v France* (2007) 45 EHRR 85, 122 (the Court).

⁴⁸ [2008] 1 AC 332, 354–5 (Lord Bingham).

⁴⁹ *Ibid* 355.

⁵⁰ *Ibid* 372–3.

⁵¹ *Ibid* 373.

⁵² By 'reductionist' Tobin refers to an approach under which 'if a matter is seen to have a general nexus with a human right, any interference with that right is considered to be a violation': John Tobin, 'Seeking Clarity in Relation to the Principle of Complementarity: Reflections on the Recent Contributions of Some International Bodies' (2007) 8 *Melbourne Journal of International Law* 356, 359. See also Michael J Kelly, 'Critical Analysis of the International Court of Justice Ruling on Israel's Security Barrier' (2005) 29 *Fordham International Law Journal* 181.

[i]dentify the existence of a nexus between the matter and (a) human right(s); identify the content of that right; identify the nature of the obligation imposed upon a state with respect to the realisation of the right(s) ... and assess whether the state has fulfilled that obligation.⁵³

Thus in the context of detention, it is not simply a matter of stating that all IHRL applies de jure. Lawyers and policy advisers must first ask whether the relevant IHRL treaty applies as a matter of law and then consider the extent of the obligation created by the relevant provision in the treaty.

It has been forcefully argued in the context of detention that '[t]he need to clarify the exact interplay between IHL and ... international human rights law is one of the most pressing issues.'⁵⁴ This argument remains valid. The lack of clarity regarding the application of IHL and IHRL to dealings with detainees was also raised as an issue of concern in a non-paper for a recent conference on the handling of detainees in international military operations.⁵⁵

Even where there is a legal norm that is applicable under IHRL — such as the prohibition against 'arbitrary detention'⁵⁶ — there is little discussion or elaboration in existing international sources as to the specific content or implications of the norm in relation to military operations such as UN peace operations.⁵⁷

To complicate the legal landscape even further, IHL and IHRL are not the only normative frameworks that determine principles, rules and standards relating to detention during military operations. Other areas of international law that also play an important role in holding military forces responsible for their dealings with detainees include international criminal law,⁵⁸ the law relating to state responsibility,⁵⁹ the law of privileges and immunities,⁶⁰ and principles relating to

⁵³ Tobin, above n 52, 359.

⁵⁴ Knut Dörmann, 'To What Extent Does International Humanitarian Law Provide for the Supervision of the Lawfulness of Detention?' (Paper presented at the Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict, Geneva, 24–25 July 2004) 15 <http://www.adh-geneva.ch/events/pdf/expert-meetings/2004/4rapport_detention.pdf>.

⁵⁵ Ministry of Foreign Affairs of Denmark Legal Service, above n 7, 5–8.

⁵⁶ *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, art 9(1) (entered into force 23 March 1976).

⁵⁷ The term 'peace operation' is used here to refer to those operations conducted by military forces, and increasingly by police, outside of their states as part of a wider diplomatic effort to assist in dealing with potential or actual armed conflict.

⁵⁸ The term 'international criminal law' is used here to refer to the body of law which deals with serious crimes such as genocide, war crimes and crimes against humanity. The body of law on which international criminal law is based includes the *Rome Statute*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), and customary international law principles. The provisions relevant to detention located in the *Rome Statute* include arts 7(1)(e) ('[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'), 7(1)(f) ('[t]orture'), 8(2)(a)(ii) ('[t]orture or inhuman treatment, including biological experiments') and 8(2)(c)(i) ('[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture').

⁵⁹ The term 'state responsibility' refers to the body of law which deals with the responsibility of states under international law. The law in relation to state responsibility is found in customary international law and documents such as the draft articles on 'Responsibility of States for Internationally Wrongful Acts' in International Law Commission, *Report of the International Law Commission*, UN GAOR, 56th sess, Supp No 10, UN Doc A/56/10 (2001) 43–59. In that document, the provisions relevant to detention include arts 25 (necessity), 26 (compliance with peremptory norms), 31 (reparation) and 36 (compensation).

⁶⁰ The law of privileges and immunities relates to the law governing the privileges and immunities granted to states, institutions and certain classes of individuals in particular circumstances as a

the responsibility of international organisations.⁶¹ In the context of detention, this list of norms is supplemented by the laws of the host country⁶² and those of troop-contributing countries.⁶³

While there is no single, integrated legal framework to apply to dealings with detainees across the spectrum of military operations, a number of common fundamental principles can be identified as governing detention. Some of the provisions in one area of the law are reflected in, or overlap with, provisions from other areas. For example, the IHL provisions relating to torture,⁶⁴ cruel treatment,⁶⁵ informing detainees of the reasons for their detention,⁶⁶ and treatment of detained women and children⁶⁷ address matters that are also dealt with by a variety of IHRL treaties and bodies of principles.⁶⁸ The ICRC, in its study

matter of international law. Such privileges and immunities are found in treaties and arrangements such as the *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964); *United Nations Convention on Jurisdictional Immunities of States and Their Property*, GA Res 59/38, UN GAOR, 59th sess, Agenda Item 142, UN Doc A/Res/59/38 (2004); *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946). They are also found in status of force agreements and customary international law. The provisions relevant to detention are located, for example, in the *Model Status-of-Forces Agreement for Peace-Keeping Operations: Report of the Secretary-General*, UN GAOR, 45th sess, Agenda Item 76, 8–13, UN Doc A/45/594 (1990).

- ⁶¹ The law relating to the responsibility of international organisations concerns, amongst other things, the attribution of conduct to international organisations, matters dealing with the breach of an international organisation's obligations, and the responsibility of international organisations in relation to acts of a state or other international organisation. The law relating to the responsibility of international organisations is currently being studied by the International Law Commission: see International Law Commission, *Responsibility of International Organisations* (16 January 2008) <http://untreaty.un.org/ilc/guide/9_11.htm>. The responsibility of international organisations has taken on greater importance recently because of the judgments in *Behrami v France* (2007) 45 EHRR 85, 121–2 (the Court). In the context of detention, a key issue is whether an international organisation such as the UN is responsible for the actions of military troops serving under the organisation's effective control: see, eg, *Al-Jedda* [2008] 1 AC 332.
- ⁶² In some circumstances the laws of the host country will determine or influence, amongst other things, which detainees must be transferred to local authorities, what evidentiary standards must be met before a detainee can be detained for alleged criminal offences and how that detainee is to be handled or dealt with until handover is completed.
- ⁶³ The laws of troop-contributing countries found the basis upon which military personnel from that country are held accountable. They may also establish fundamental obligations concerning standards of treatment of detainees that military personnel from that country must comply with.
- ⁶⁴ *Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3, art 75(2)(a) (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609, art 4(2)(a) (entered into force 7 December 1978) ('*Additional Protocol II*').
- ⁶⁵ *Geneva Convention I*, opened for signature 12 August 1949, 75 UNTS 31, art 3 (entered into force 21 October 1950); *Geneva Convention II*, opened for signature 12 August 1949, 75 UNTS 85, art 3 (entered into force 21 October 1950); *Geneva Convention III*, opened for signature 12 August 1949, 75 UNTS 135, art 3 (entered into force 21 October 1950); *Geneva Convention IV*, opened for signature 12 August 1949, 75 UNTS 287, art 3 (entered into force 21 October 1950).
- ⁶⁶ *Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3, art 75(3) (entered into force 7 December 1978).
- ⁶⁷ See, eg, *Geneva Convention IV*, opened for signature 12 August 1949, 75 UNTS 287, art 76 (entered into force 21 October 1950); *Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3, pt IV, s III, ch II (entered into force 7 December 1978).
- ⁶⁸ For a more detailed examination of the interaction between IHL and IHRL in relation to detention, see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005) vol 1, 299–494.

of the development of IHL, recognises the role that human rights law plays ‘to support, strengthen and clarify analogous principles of international humanitarian law.’⁶⁹ Principles relating to detention are also found in other areas of law including those of international criminal law,⁷⁰ and privileges and immunities.⁷¹

The effect of not having a single legal regime that deals with detainees and the fact that applicable norms have to be ascertained from within a fragmented normative framework means that policy and legal advisers must examine the law as a whole, rather than relying strictly upon one specialist regime capable of being applied across contexts.⁷² Legal and policy advisers therefore create legal frameworks for detention on an ad hoc basis, determining for themselves what the legal principles, rules and standards are — in other words, it is a matter of developing legal regimes ad hoc, and interpreting and applying law by analogy.

A key advantage of establishing legal frameworks by analogy is that it allows advisers to develop legal norms that are flexible and situation-specific. This may be of considerable benefit to military commanders and politicians as the greater flexibility and margin of appreciation in the legal norms permit the law to meet the needs of military personnel in the field and sometimes even their political masters at home. The application of law by analogy ensures that the law is ‘living’ in the sense that it reflects the present military and political conditions.

Another advantage of developing norms by analogy is that the interpretation of a particular norm does not have to be in accordance with a particular *lex specialis* regime. Thus, when developing law by analogy one may select norms from one legal regime and apply them either more broadly or more narrowly in the framework being created. For example, by analogy with the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*,⁷³ one may define ‘detention’ to mean the condition of a person ‘deprived of personal liberty except as a result of conviction for an offence.’⁷⁴ This is quite a broad definition and would cover situations where armed military personnel stop a civilian for questioning or a search. One can see why military personnel may not wish such an analogy to be drawn; they might therefore redraft the definition along the lines of ‘detention means the condition of a person who has been deprived of their personal liberty for a period of more than six hours’. This narrower definition would permit military personnel to hold the detainee for the period of six hours without necessarily granting the detainee the legal rights that apply when a person is defined as being detained.

However, there are also considerable disadvantages to developing legal regimes on an ad hoc basis and interpreting and applying law by analogy. These include the amount of time involved in establishing acceptable principles that manage expectations in what is an increasingly sensitive political issue, the difficulty of finding a coherent justification for adopting a particular approach to

⁶⁹ Ibid xxxi.

⁷⁰ See above n 58 and accompanying text.

⁷¹ See above n 60 and accompanying text.

⁷² See, eg, International Law Commission, *Fragmentation of International Law*, above n 22, 23–5.

⁷³ GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, 298–300, UN Doc A/Res/43/173 (1988).

⁷⁴ Ibid 298 (definition of ‘detained person’).

a particular subject matter, and the potential for uncertainty regarding the applicable legal norm (there may be adverse consequences for military personnel and their commanders if it is subsequently alleged that they were involved in a violation of an international or national criminal law provision). Developing law by analogy can also lead to situations where a legal framework developed for a particular operation is inappropriately applied as a template to other situations. For example, the US government's *Final Report of the Independent Panel to Review Department of Defense Detention Operations* found that '[a]lthough specifically limited by the Secretary of Defense ... the augmented techniques for Guantánamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded.⁷⁵

Problems also arise when the different regimes that are used by analogy no longer function well together. This occurs where gaps and limitations in those regimes make it difficult to achieve effective and efficient operations and raise concerns about accountability. Differing interpretations of the law may also give rise to friction regarding the application of specific norms and this, in turn, can impact on accountability. The issue of accountability is particularly acute in circumstances where conflicting interpretations of the law lead to uncertainty and there are no mechanisms in place to give victims a voice. Given the military's focus on security, this may lead to abuses.⁷⁶ While there are many areas of law where developing norms by analogy is a perfectly appropriate legal technique, in situations where the law concerns fundamental rights and imposes criminal law consequences if those rights are violated, there is a corresponding requirement to ensure that any norms developed are certain, clear, consistent and internationally accepted. In the context of detention, it is becoming increasingly obvious that these requirements can only be met by developing a special regime.

A Case Study and Hypotheticals

The following case study and hypotheticals demonstrate how complex certain aspects of taking and handling detainees can be, and how developing law on an ad hoc basis and by analogy may not always provide the levels of clarity required by military personnel and civilians.

David Marshall and Shelley Inglis, in their study of the application of IHRL to the UN Mission in Kosovo ('UNMIK'), emphasise the practical effects that 'fairly opaque references to international human rights law and its relevance within the patchwork of the applicable law' can have when dealing with detainees.⁷⁷ In Kosovo, the detention of civilians for security reasons without accompanying processes for the judicial review of those detentions meant that the Kosovo Force ('KFOR') possessed 'seemingly unchallengeable authority' to hold detainees.⁷⁸ This authority to deal with detainees even extended to KFOR setting up a parallel legal system for reviewing its own detentions because

⁷⁵ As reprinted in Steven Strasser (ed), *The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq* (2004) 14–15.

⁷⁶ See further below Part III(A).

⁷⁷ Marshall and Inglis, above n 37, 105.

⁷⁸ *Ibid* 103.

decision-makers believed that the Kosovo system was ‘ill-equipped to address illegal activity’,⁷⁹ and thus there was no judicial mechanism by which detained persons could challenge their detention.⁸⁰ Marshall and Inglis describe at least three principal inadequacies associated with detention in Kosovo that arose as a result of the lack of a formalised and systematised detention framework that applied to all stakeholders concerned with detention. First, they argue that KFOR considered itself bound by the law only when it wanted to be bound by it, noting that this was ‘exemplified by the fact that regulations concerning basic human rights principles in the area of the rule of law [were] considered not to apply to KFOR despite the fact that it [was] still involved in law enforcement.’⁸¹ Secondly, they argue that KFOR’s justification for detaining civilians, based on a need to maintain a secure environment rather than ensuring public safety and order, ‘led to uncertainty in Kosovo about the scope of KFOR’s authority.’⁸² Thirdly, they argue that UNMIK’s power could be used ‘arbitrarily and unfairly without accountability, transparency, or predictability — in contravention of the meaning of justice and the rule of law’ — because there was no framework to challenge the UN administration’s power.⁸³

Consider also the situation where a military force is developing the legal framework in relation to handing over a detainee to local authorities in circumstances where that force has been invited by the host country to maintain law and order. Where such an invitation occurs in the context of an internal armed conflict, there are very limited specific international treaty provisions for dealing with those detained.⁸⁴ In such a situation, does that force give precedence to the customary international law principle that recognises the sovereignty of the host country over all persons within its territory,⁸⁵ or is there a higher obligation not to hand over the detainee if there are ‘substantial grounds for believing that the [detainee] would be in danger of being subjected to torture’?⁸⁶ The presumption against interfering in the ‘domestic jurisdiction of any State’, reinforced by art 2(7) of the *Charter of the United Nations*, severely restricts the legal authority of a military force to hold detainees that are nationals of the host country in situations where that force is conducting operations with the consent of that country and is not acting pursuant to ‘the application of enforcement

⁷⁹ Ibid 111.

⁸⁰ Ibid.

⁸¹ Ibid 110.

⁸² Ibid 111.

⁸³ Ibid 104.

⁸⁴ *Additional Protocol II*, opened for signature 8 June 1977, 1125 UNTS 609, arts 4–6 (entered into force 7 December 1978) deals with the humane treatment of individuals whose liberty has been restricted. However, those articles provide little specificity as to how the guarantees are to be achieved or what procedural safeguards are required to give effect to the guarantees.

⁸⁵ See Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim’s International Law* (9th ed, 1992) vol 1, 458.

⁸⁶ Article 3(1) of the *Convention against Torture*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) states: ‘No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’

measures under Chapter VII.⁸⁷ While it is true that there has been some debate as to whether art 2(7) is a legal or a political limitation,⁸⁸ it is clear that the International Court of Justice has identified the principle encapsulated in the article as a norm of customary international law.⁸⁹ To argue otherwise would be to go against the ‘logical manifestation of a world order of independent states ... since the authorities of a state are responsible for the conduct of law and maintenance of good order within that state.’⁹⁰

An argument could also be mounted that, as a matter of international law, in circumstances where there is a substantial belief that a detainee may be tortured by local authorities, the military force is prohibited from handing the detainee over to those authorities.⁹¹ In such cases, the issue of sovereignty is therefore irrelevant. Needless to say, balancing the competing norms in such cases would require the military force to place itself in the difficult political and diplomatic position of assessing the host nation’s ability to deal with detainees. Troop-contributing countries would clearly emphasise that, in accordance with general principles of international law, the obligation to comply with the *Convention against Torture* rests with the host country, particularly in situations where the troop-contributing country is undertaking military operations with the consent of the host country. It is therefore the host country that must ensure it takes ‘measures to prevent acts of torture in any territory under its jurisdiction.’⁹² As Christopher Greenwood argues, it is difficult to see how a serious argument can be mounted that the principle of jurisdiction in art 2(1) of the *Convention against Torture* can apply in circumstances where the troop-contributing country is not ‘exercising legislative, judicial or even administrative functions’.⁹³

The issue of whether the existence of a substantial belief relating to torture should be assessed on the basis of some objective standard, or on a more subjective standard such as the belief of the detainee, also needs to be resolved. If there are no grounds to hold a substantial belief that the detainee in question is likely to be tortured, is there an ongoing legal obligation for the military force to monitor the treatment of the detainee? If there is such an obligation, for how long does the obligation continue, and what subsequent obligations arise for the

⁸⁷ Article 2(7) of the *Charter of the United Nations* provides:

Nothing contained in the present *Charter* shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present *Charter*; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

⁸⁸ Leland M Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (2nd revised ed, 1949) 113.

⁸⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 106.

⁹⁰ Malcolm N Shaw, *International Law* (5th ed, 2003) 579.

⁹¹ This matter has, in the context of Afghanistan, been the subject of an Amnesty International Report. The report came out at the time the final draft of this article was written and therefore the substantive legal issues raised in the report are not addressed here: see Amnesty International, above n 14, 9–10.

⁹² *Convention against Torture*, opened for signature 10 December 1984, 1465 UNTS 85, art 2(1) (entered into force 26 June 1987).

⁹³ Greenwood, above n 43, 19. Cf Amnesty International, above n 14, 9–10.

detaining power to take custody again of the detainee?⁹⁴ Can a state rely upon assurances from other states to which they transfer or hand over the detainee?⁹⁵

The situation of handing over a detainee is made even more complicated when one considers issues relating to the application of either international or domestic criminal law where it is alleged that a military member who has handed over a detainee to host country authorities is complicit in committing torture.⁹⁶ A finding of such complicity raises the issue of command responsibility. Subordinates at the tactical level might, for example, argue that it is unreasonable to expect them to know how detainees are going to be treated by host nation authorities. Such matters, they would argue, are better dealt with by commanders at the strategic and operational levels because they have the means of finding out about how detainees are treated and to judge the veracity of any competing claims relating to that treatment. Thus, command responsibility may extend to commanders being responsible for making necessary and reasonable enquiries relating to how detainees are likely to be treated if handed over to host country authorities.

Another issue worth reflecting upon is the lack of a legal framework to govern the actions and omissions of peacekeepers who detain individuals during peace operations.⁹⁷ Questions arise in relation to matters such as the legal basis for detention, the minimum de jure standards of treatment, the obligation of peacekeepers to hand the detainee over to local authorities and the accountability of peacekeepers. Issues such as whether detention is an implied power given to peacekeepers in situations where there is neither express authority from the Security Council nor consent from the host country must be answered so as to avoid allegations of unlawful or arbitrary detention. Questions regarding the appropriate legal basis for holding security detainees and the minimum standards for the treatment of detainees also arise more generally. Circumstances where the operation is not conducted pursuant to a binding Security Council Resolution or with the consent of the host country complicate matters further. In such situations, should the law of occupation be applied as the most appropriate legal regime? Should human rights law apply? Or should both regimes be applied together? If both regimes are applied, how does one select the most appropriate legal standard if there are competing standards between the two regimes?

Take, for example, the situation where a peacekeeper detains an individual who is perceived to be a security threat because they are taking photos of the disposition of troops around what is considered 'mission essential property'.⁹⁸ In

⁹⁴ For example, is there a legal obligation to track detainees after they have been sentenced?

⁹⁵ See, eg, Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture* (2005) <<http://hrw.org/reports/2005/eca0405/eca0405.pdf>>.

⁹⁶ In this context, Byers and Schabas wrote to the Prosecutor of the International Criminal Court on 25 April 2007, drawing to his attention 'possible war crimes committed [by the Canadian Minister of National Defence and the Canadian Chief of Defence Staff] with respect to the transfer of detainees from Canadian custody in Afghanistan': The Tyee, *Canadian War Crimes?* (27 April 2007) <<http://thetyee.ca/Views/2007/04/27/WarCrime/>>.

⁹⁷ See above n 57.

⁹⁸ 'Mission essential property' refers to that property designated by a commander to be property that is essential to the successful completion of the mission and therefore given special protection status. In some situations, military forces may be authorised to use lethal force to protect

such circumstances, should the peacekeeper rely upon the law of military occupation by analogy to provide the legal basis for taking and handling the detainee, or is it more appropriate to rely upon the human rights regime? This lack of certainty can have far-reaching consequences for detainees because it may lead to uncertainty in relation to such matters as the status of the detainee, the standards of treatment to which the detainee is entitled, to whom a detainee may be transferred or handed to, and when a detainee may be released. Furthermore, general statements to the effect that both IHL and IHRL apply are not useful in the absence of more specific explanations as to which provisions apply and how these bodies of law interact.

Depending on the legal framework applied, a detainee may be treated differently in relation to the justification for the detention, the length of time they may be detained, their status and treatment, and when and to whom they may be handed over or transferred. Not only is this a complicated legal regime to apply and to justify to local populations, but it is also difficult for military forces to apply consistently when undertaking coalition operations.

The issues discussed in relation to the UNMIK case study and hypotheticals above raise concerns that go beyond developing a better understanding of the law. It is difficult to deal with political and military interests when states require their military forces and the local population in the area of operations to function within ‘Babel-like set[s] of arrangements and agreements’⁹⁹ that are sometimes uncertain and inadequate in dealing with the spectrum of detention issues that arise during contemporary military operations.

The most effective and efficient way to create greater certainty, consistency and clarity in norms concerning detention is to develop a special legal regime that formalises and systematises appropriate principles, rules and standards for military operations. Advocating for the need to develop a special legal regime is doing no more than recognising that ‘contemporary international law is made and operates through special regimes within a framework of generally applicable principles.’¹⁰⁰

B *Special Legal Regimes*

A useful start when considering the application of special legal regimes in international law is the International Law Commission’s study group report concerning the fragmentation of international law.¹⁰¹ That report reaffirmed that, as a general principle of legal doctrine, ‘if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former.’¹⁰² In this sense, one imagines the creation of a set of principles, rules and standards that functions ‘in the manner of [a]

mission essential property. Such property might include bridges, military assets such as helicopters, and other strategic sites such as radio and television stations.

⁹⁹ This phrase was used to describe the detainee policy instituted by the US and its allies in present-day Afghanistan: Roberts, ‘Torture and Incompetence in the “War on Terror”’, above n 5, 200.

¹⁰⁰ Alan Boyle and Christine Chinkin, *The Making of International Law* (2007) 24.

¹⁰¹ International Law Commission, *Fragmentation of International Law*, above n 22.

¹⁰² *Ibid* 34–5.

self-contained regime ... claiming to be regulated by [its] own principles'¹⁰³ and therefore standing outside the general principles and rules that might develop and apply by analogy. This is not to say, however, that by developing self-contained regimes states can 'contract out' of the application of general law.¹⁰⁴ More specifically, such regimes cannot breach *jus cogens* norms; 'deviate from the law benefiting third parties';¹⁰⁵ deviate from obligations of general law that are of "integral" or "independent" nature, have *erga omnes* character or [apply] where State practice has created a legitimate expectation of non-derogation';¹⁰⁶ or 'deviate from treaties that have a public law nature or which are constituent instruments of international organizations.'¹⁰⁷ Examples of such special regimes include diplomatic law,¹⁰⁸ 'cooperation [agreements] between the International Criminal Court and State Parties under the *Rome Statute*',¹⁰⁹ laws of armed conflict, international criminal law, trade law and environmental law.¹¹⁰

Special legal regimes are beneficial in that they 'take better account of the particularities of the subject-matter to which they relate'¹¹¹ — that is, 'they regulate it more effectively than general law and follow closely the preferences of their members'.¹¹² They also 'identify and articulate interests that serve to direct the administration of the relevant rules'¹¹³ and their contents may be more readily settled because they are more likely to be context-specific. A special regime does not have to be in the form of a treaty or convention, but would need to be generally accepted as 'a single, generally applicable set of rules' dealing with detainees.¹¹⁴ Thus it would be possible to have a generally accepted system of principles, rules and standards, which is recognised as covering matters relating to detainees and therefore to be resorted to in the first instance when establishing more specific rules and standards for dealing with detainees in a particular operational setting.

In the context of dealing with detainees, the question is whether there is a need for a special self-contained legal regime that focuses specifically on matters such as:

- the legal basis for taking detainees;
- the manner in which detainees are to be treated at the time of (and subsequent to) detention;

¹⁰³ Ibid 81.

¹⁰⁴ Ibid 82–3.

¹⁰⁵ Ibid 83.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 66.

¹⁰⁹ Ibid 68.

¹¹⁰ Ibid 84.

¹¹¹ Ibid 99.

¹¹² Ibid.

¹¹³ Ibid 71.

¹¹⁴ Ibid 74.

- the obligations that relevant international organisations have in dealing with detainees; and
- the accountability of military forces (as well as the states and international organisations they represent) for any allegations of abuse or mistreatment of a detainee.

If developed carefully and in consultation with key stakeholders, a special regime focusing on detention would have the advantages of taking more specific account of the key aspects of detention, regulating the detention regime more effectively and adhering more closely to the interests of all parties concerned.¹¹⁵ While it is true that problems of interpretation of specific norms are still likely to exist even when applying a special regime, those problems may be minimised because of the specific nature of the regime.

C Issues in Establishing a Special Legal Regime for Detention

There will, no doubt, be concerns regarding the feasibility of developing a special legal regime for dealing with detainees given the need to find consensus on which principles, rules and standards it should incorporate, as well as the resources required to ensure that it meets internationally accepted standards of legitimacy and transparency. There will also be pragmatic questions concerning whether such a detention regime will actually make a difference when planning for and conducting operations during which detainees are taken and handled. The difficulty of developing a special regime to apply to dealings with detainees is not to be underestimated. Nevertheless, increasing demands for clarity, consistency and certainty make it difficult to justify not developing clearer and more context-sensitive principles, rules and standards for dealing with civilian detainees during military operations.

Another salient concern is whether a special detention regime will lead to inconsistencies with established law or compound the uncertainty or lack of clarity already present in this area. Inconsistencies with other legal regimes can be minimised by ensuring that the special regime is developed in accordance with *jus cogens* norms, customary law and general principles of law. Concerns about inconsistencies with existing legal regimes may also be minimised by carefully examining the following issues:

- where should such a regime rest in international law?
- against what 'lodestar' should the norms relating to detention be measured?
- should the regime cover the spectrum of military operations or only specific types of military operations?
- how broad and detailed should such a regime be?
- which institution should develop such a regime? and
- how binding should the special regime be on states, international organisations and other entities involved with dealing with detainees?

¹¹⁵ Ibid 99.

It is essential to recognise that the proposal to create a special legal regime does not mean that existing legal frameworks such as IHL and IHRL are to be abandoned. In fact, existing legal frameworks provide an excellent foundation upon which to build a special legal regime to deal with detainees. The aim of this Part is not to state what shape the legal regime should take, but rather to address key issues that will require further consideration when formulating and standardising the special regime.

1 *Siting the Special Legal Regime*

The issue of where a special legal regime dealing with detention should rest in international law is important. Should the ‘detention regime’ sit within an existing special international law regime such as IHL or IHRL, or should it sit outside any existing regimes as if it were its own independent international law regime?

The most appropriate area in which to place a detention regime will depend upon whether that regime is intended to cover the spectrum of military operations, or whether it is limited to a specific type of operation such as United Nations peace operations.¹¹⁶ If, for example, it is intended that the special legal regime will deal with detainees during armed conflict — such as that engaged in by the International Security Assistance Force in Afghanistan in 2007 — then the legal regime should arguably rest in IHL. If, on the other hand, the intended context is closer to a peace operation where military forces are not engaged in armed conflict but are undertaking a law and order mandate that requires them to deal with alleged criminals, then it might be more appropriate for the legal regime to be developed within IHRL since that area of law provides relatively more detail concerning the treatment of alleged criminals.¹¹⁷ Another important reason for identifying where the legal regime should sit arises from the fact that the legal terms used in one regime may not have the same meaning if used in another regime. For example, the principle of proportionality in IHL requires ‘that losses resulting from a military action should not be excessive in relation to the expected military advantage.’¹¹⁸ Proportionality in IHRL, however, refers to

¹¹⁶ The term ‘United Nations peace operations’ as used in this article refers to those peace operations that are authorised, commanded and controlled by the UN.

¹¹⁷ See, eg, *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, arts 5–10 (entered into force 23 March 1976); *Convention against Torture*, opened for signature 10 December 1984, 1465 UNTS 85, art 16 (entered into force 26 June 1987); First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Resolutions and Recommendations Adopted by the Congress*, 3–21, UN Doc A/CONF.6/L.17 (1955) (‘Standard Minimum Rules for the Treatment of Prisoners’); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, 298–300, UN Doc A/Res/43/173 (1988); *Code of Conduct for Law Enforcement Officials*, GA Res 34/169, UN GAOR, 3rd Comm, 34th sess, 106th plen mtg, UN Doc A/Res/34/169 (1979); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc A/CONF.144/28 (1990) (welcomed by the General Assembly in *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, GA Res 45/121, UN GAOR, 3rd Comm, 45th sess, 68th plen mtg, UN Doc A/Res/45/121 (1990)); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*, GA Res 40/33, UN GAOR, 3rd Comm, 40th sess, Agenda Item 98, UN Doc A/Res/40/33 (1985); *Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials*, ESC Res 1989/61, UN ESCOR, 1st sess, UN Doc E/Res/1989/61 (1989).

¹¹⁸ Ministry of Defence, above n 1, 25.

situations ‘where a restriction upon a right is permitted, [and specifies how] to control that restriction.’¹¹⁹

There are strong arguments for setting a special regime dealing with detention in the *lex specialis* of IHL, particularly in situations where the focus is on the military taking and handling detainees. IHL remains relevant in such circumstances because of its focus on the conduct and management of military operations and the interaction between the military and civilian population during such operations. If, however, the taking and handling of detainees is to be predominantly undertaken by international police forces in future operations, then it might be preferable to develop the special regime within IHRL, as that law is more suitable and relevant to police dealings with civilian populations.

A further option worth considering is to create a special legal regime that sits outside IHL or IHRL. The benefit of this option is that the legal regime developed would not have to focus on one context, such as armed conflict or peace operations, but would encompass the full spectrum of military operations. Furthermore, the special legal regime would also be developed to straddle the areas of law that would be relevant to dealing with detainees.

2 *The Lodestar*

Accepting that ‘there is [not] always a clear and specific legal rule readily applicable to every international situation, but ... every international situation is capable of being determined as a matter of law’,¹²⁰ it is perhaps useful to consider what ‘lodestar’ should be used as a reference point when adjudicating between competing norms. As Higgins J has argued, when difficult questions of law arise, the lodestar must be ‘those values that international law seeks to promote and protect.’¹²¹ In determining what this lodestar should be in the context of detention, it is worth reflecting on the intention behind the establishment of a special regime. Is it to find the appropriate balance between the need of the military to achieve their mission and the rights of detainees? Does it put the needs of detainees first and foremost, aiming to ‘prevent or mitigate [their] suffering and, in some cases, to rescue [them] from the savagery of battle and passion’?¹²² Or is it to deal with the rights and needs of the victims of those detained, meaning that the rights of the detainee and the military are not paramount?

The nature of the appropriate lodestar may also be influenced by where the special regime sits as a matter of law. If the regime sits within IHL, for example, the lodestar would be influenced by the basic principles of IHL: military necessity, proportionality, distinction and humanity. If the regime sits within IHRL, then the lodestar would be influenced by the requirement to ensure that rights are provided to everyone and that there are effective remedies in place if such rights are violated. If the special legal regime sits outside existing regimes,

¹¹⁹ Higgins, above n 35, 234.

¹²⁰ Jennings and Watts, above n 85, 12–13 (emphasis omitted).

¹²¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 592.

¹²² Hersch Lauterpacht, ‘The Problem of the Revision of the Law of War’ (1952) 29 *British Year Book of International Law* 360, 364.

the lodestar might be the need to restore and maintain peace and security, and to ensure that fundamental human rights of detainees are not abused.

3 *Settling Norms*

In relation to whether such a regime should cover the spectrum of military operations, a key factor will be the extent to which the international community is willing to negotiate and settle on norms. For example, states and international organisations might find it less controversial from a political perspective to settle on norms that focus only on the conduct and management of UN peace operations, particularly where such operations are not concerned with matters of national security but rather with law and order. In such situations, the narrow context in which a special regime is to apply and the fact that the regime is unlikely to affect a state's ability to protect itself from threats to its security is likely to mitigate political concerns relating to sovereignty and the manner in which it chooses to protect its population. Factors that will need to be considered, therefore, are the extent to which the norms that are being negotiated are compatible with those found in general law. If key stakeholders such as states and international organisations decide that a special regime should apply to a narrow spectrum of military operations — for example, UN peace operations that do not cross the threshold of international armed conflict — that regime could then form the foundation for filling gaps and limitations by analogy when stakeholders are obliged to apply another special regime such as IHL.

Another option is to settle on a very general set of principles that apply across the spectrum of military operations. These principles would serve as a foundation from which stakeholders could develop more specific rules and guidelines that focus on dealing with detainees during specific operations such as UN peace operations. A further advantage of establishing general principles for dealing with detainees is that it would permit drafters to consider the application of legal principles by looking at the international and domestic law as a whole and then selecting key principles that are fundamental to ensuring that detainees are treated in accordance with the rule of law. This approach also avoids settling on principles from the more narrow perspective of, for example, IHL or IHRL.

There are several options as to how much detail the scheme would possess. The regime could articulate fundamental principles in the most basic terms, or elaborate on each principle in some detail. The most pertinent issues would be:

- whether the detention regime should cover the conditions in which the detainee is held;
- the reasons for detention;
- treatment of the detainee at the point of detention;
- the treatment of the detainee in any subsequent situation of transfer or handover;
- the responsibilities of states and international organisations in relation to treatment, release, transfer and handover; and
- any formal review and compensation processes arising from allegations made by the detainee.

If it were decided to restrict the regime to fundamental principles in basic terms, the regime could have utility as a foundation for more specific rules and standards which could be developed to match the particular needs of specific operations.¹²³

4 *Institutional Responsibility*

The appropriate institution to take responsibility for developing such a legal regime would depend heavily upon: first, whether or not the regime is intended to cover the full spectrum of operations; and, secondly, the intended breadth and depth of the regime. If stakeholders¹²⁴ decide that the legal regime would only deal with UN peace operations, then it may be appropriate for the UN Department of Peacekeeping Operations to take the lead in developing the regime. If it were decided that developing such a regime should be considered from a more universal perspective, then it may be appropriate for the International Law Commission to be instructed to examine the issues in the first instance. Of course, there are other entities such as the ICRC (in its capacity as the guardian of IHL) which could also develop such a regime.¹²⁵

Any such development should not be undertaken by an international organisation unless that organisation endeavours to work closely with states. It is only with a spirit of collaboration, close consultation and a desire to be transparent that the interests of the parties and entities involved in the taking and handling of detainees are likely to be appropriately balanced.

5 *Binding Nature of the Regime*

When developing a special detention regime, the question of whether it should be binding on states and international organisations responsible for dealing with detainees will also need to be addressed. It is worth examining in some detail the range of binding and non-binding instruments that could give effect to a special detention regime and the efficacy of each of these instruments in ensuring that the political and military expectations can be managed effectively. Given the choice of creating binding legal instruments or establishing standards that are appropriate and effective but non-binding, many states would most probably prefer the development of the latter because of the operational flexibility it offers.¹²⁶ In considering the binding nature of international instruments in the context of military operations, much greater thought also needs to be given to the accountability of non-government actors such as contractors. In the context of detention, this may be particularly important if states and international organisations decide that one option available for mitigating the political and military

¹²³ See below Part III(C)(6).

¹²⁴ In this context, the term 'stakeholders' refers to those organisations that have an interest in developing a special legal regime concerning the taking and handling of detainees. These would include states and international organisations such as the UN, North Atlantic Treaty Organisation (NATO), European Union (EU), African Union (AU) and the ICRC.

¹²⁵ The International Law Commission's object is 'the promotion of the progressive development of international law and its codification': *Statute of the International Law Commission*, adopted by *Establishment of an International Law Commission*, GA Res 174 (II), UN GAOR, 2nd sess, 123rd plen mtg, 105, UN Doc A/Res/174(II) (1994).

¹²⁶ For a more detailed discussion about the benefits of various legal instruments such as treaties, soft law instruments and guidelines, see Boyle and Chinkin, above n 100, 181–3.

risks of taking and handling detainees is to outsource the ‘controversial’ aspects of dealing with detainees, such as handling and/or interrogating detainees to private military contractors.

6 *Fundamental Norms*

If my advocacy for a special detention regime is persuasive, I then submit that the principles below ought to be among the fundamental norms included in that regime:

- *Principle of lawfulness*: This principle is founded on art 9(1) of the *International Covenant on Civil and Political Rights* (‘ICCPR’),¹²⁷ which requires that ‘[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ Thus, there must be a lawful basis for taking detainees and holding them in detention. The principle of lawfulness in this context would also apply to their treatment, conditions for detention and the process for handling them.
- *Principle of reasonableness and necessity*: This principle is founded upon two basic principles of IHL — military necessity and humanity.¹²⁸ Both principles require military personnel to ensure that their actions (and sometimes their omissions) during military operations do not cause suffering which is not necessary to achieve the military mission. The taking and handling of detainees must be judged by what is reasonable and necessary at the time. The term ‘reasonableness’ as it is used in this context seeks to ensure that the justification for dealing with detainees is capable of being measured against a more objective standard than just the subjective standard of ‘necessity’. A detainee must be released if the reason for their detention no longer clearly exists.
- *Principle of humane treatment*: In IHL, the principle of humane treatment is articulated most strongly in art 75 of *Additional Protocol I*, which provides that acts such as torture, corporal punishment and outrages upon personal dignity are prohibited at any time.¹²⁹ The IHL distinction between the principle of humanity and that of humane treatment is that the former recognises that armed conflict will cause suffering but requires such suffering to be measured against what is required in order to accomplish the military mission; the principle of humane treatment, on the other hand, prohibits certain forms of treatment even if those forms may be justified on the basis of military necessity. In IHRL, the principle of humane treatment prohibits torture and cruel, inhumane or degrading treatment.¹³⁰

¹²⁷ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹²⁸ The principle of ‘military necessity’ permits military forces in armed conflict to use only force that is otherwise prohibited by IHL to achieve the legitimate purposes of the conflict. The principle of ‘humanity’ forbids the infliction of suffering, injury or destruction not actually required to accomplish the legitimate purposes of the conflict. For a more detailed description of these principles, see Ministry of Defence, above n 1, 21–4.

¹²⁹ *Additional Protocol I*, opened for signature 8 June 1977, 1125 UNTS 3, art 75(2) (entered into force 7 December 1978).

¹³⁰ See, eg, *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, art 5, UN Doc A/Res/217A(III) (1948); *ICCPR*, opened for signature 19 December

- *Principle of accountability*: Individuals, states and organisations involved in the process of decision-making and the implementation of decisions relating to the taking and handling of detainees must be accountable for their actions and, where relevant, their omissions. The principle is based on the recognition that accountability relates to governance and is therefore a precondition to responsibility under law. More specifically, the principle seeks to ensure that individuals, states and organisations dealing with detainees are subjected to, and exercise, appropriate forms of internal and external scrutiny and monitoring so as to ensure that the taking and handling of detainees meet at least the requirements that arise from the principles of lawfulness, reasonableness and necessity, and humane treatment.¹³¹

IV CONCLUSION

Existing legal regimes that deal with the taking and handling of detainees are fragmented and inadequate for meeting the challenges of contemporary military operations. Developing legal frameworks regulating detention on an ad hoc basis and by analogy no longer serves the needs of military forces, their political masters or the civilian population with which the military forces have to interact.

One means of meeting the needs of these stakeholders is to develop a special legal regime that deals with detention, thus bringing greater clarity, certainty and consistency to fundamental issues such as the legal basis for taking detainees, the manner in which detainees are to be treated, and the accountability and responsibility of military forces.

Developing such a regime will not be easy. Stakeholders will need to consider fundamental issues such as which principles, rules and standards should be incorporated into the regime; how best to ensure accountability for the mistreatment of detainees; and which institution should develop such a regime. Ultimately, the special regime will have to find the appropriate balance between the rights and obligations of both the detainee and the military force responsible for the detention. Such a balance, however, will need to be found within the rule of law and, consequently, must be built upon some fundamental norms such as lawfulness, humane treatment and accountability.

1966, 999 UNTS 171, art 7 (entered into force 23 March 1976); *Convention against Torture*, opened for signature 10 December 1984, 1465 UNTS 85, arts 1, 16 (entered into force 26 June 1987).

¹³¹ For a more detailed discussion relating to accountability in the context of dealing with detainees, see Bruce 'Ossie' Oswald, 'Accountability for the Treatment of Civilian Detainees during Military Operations: Developing Principled Practice' (2007–08) 5 *New Zealand Yearbook of International Law* 131.